

UNITED STATES
v.
WESTERN MINERALS & PETROLEUM, INC.

IBLA 72-305

Decided August 9, 1973

Appeal from decision of Administrative Law Judge Robert W. Mesch (Idaho ML 667-71) denying permission to conduct placer mining operations on those portions of a group of five mining claims located on land withdrawn for a power site.

Affirmed.

Mining Claims: Power Site Lands -- Mining Claims: Special Acts -- Mining Claims: Surface Uses --
Mining Claims Rights Restoration Act

It is proper under the Mining Claims Rights Restoration Act of 1955 to prohibit all placer mining operations on land within a group of mining claims included in a power site classification, where unrestricted placer mining on such land would most probably result in substantial interference with the use of the land for watershed purposes.

Mining Claims: Power Site Lands -- Mining Claims: Special Acts -- Mining Claims: Surface Uses --
Mining Claims Rights Restoration Act -- Secretary of the Interior

The Mining Claims Rights Restoration Act of 1955 allows the Secretary of the Interior no discretion to permit limited or restricted placer mining on land withdrawn or reserved for power development or power sites. The Secretary may permit either unrestricted placer mining or none at all. The only condition which he may

impose upon his permission to mine is that the locator must restore the surface of the claim to its condition immediately prior to mining operations. In determining whether to allow placer mining subject to this condition, the criteria are:

(1) whether the surface can practicably be restored to its original condition after the claim has been mined to its full potential; and (2) whether restoration of the surface would prevent substantial interference with other use of the land.

APPEARANCES: Lionel M. Farr, Esq., Salt Lake City, Utah, for Appellant.

OPINION BY MR. FRISHBERG

This is an appeal from a decision by Administrative Law Judge 1/ Robert W. Mesch, dated January 31, 1972, denying permission to conduct placer mining operations on certain lands within a power site classification. Specifically, the decision would prohibit mining on those portions of a group of placer mining claims embraced within Power Site Classification No. 155, approved December 9, 1926. The lands which would be closed to placer mining comprise the entire area of the Joe's Gulch Nos. 2 and 3 claims, and parts of the Joe's Gulch Nos. 1 and 4 and Cochran Gulch claims. The claims, which were located on July 29, 1968, are in Custer County, Idaho, in the vicinity of the Salmon River and within the Challis National Forest.

Location of the claims was made pursuant to the Mining Claims Rights Restoration Act of 1955, 30 U.S.C. §§ 621-625 (1970), which, with certain exceptions, 2/ opens to mining location lands withdrawn or reserved for power development or power sites. Section 4

1/ By order of the Civil Service Commission, the title "Administrative Law Judge" has replaced that of "Hearing Examiner" 37 F.R. 16787 (August 19, 1972).

2/ Excepted by the Act are:

"[A]ny lands (1) which are included in any project operating or being constructed under a license or permit issued under the Federal Power Act or other Act of Congress, or (2) which are under examination

of the Act (30 U.S.C. § 623 (1970)) requires any person who locates a mining claim after August 11, 1955, on lands subject to its provisions to file, within 60 days of location, a copy of the notice of location in the land office for the district in which the claim is situated. In the case of a placer claim, section 2(b) (30 U.S.C. § 621(b) (1970)) prohibits the locator from conducting mining operations for a period of 60 days after filing in the land office.

Section 2(b) further provides:

If the Secretary of the Interior, within sixty days from the filing of the notice of location, notifies the locator by registered mail or certified mail of the Secretary's intention to hold a public hearing to determine whether placer mining operations would substantially interfere with other uses of the land included within the placer claim, mining operations on that claim shall be further suspended until the Secretary has held the hearing and has issued an appropriate order. The order issued by the Secretary of the Interior shall provide for one of the following: (1) a complete prohibition of placer mining; (2) a permission to engage in placer mining upon the condition that the locator shall, following placer operations, restore the surface of the claim to the condition in which it was immediately prior to those operations; or (3) a general permission to engage in placer mining. * * *

A public hearing to determine whether placer mining operations would substantially interfere with other uses of the power site land within the claims was held in Challis, Idaho, on April 22, 1971. Judge Mesch found that the evidence introduced at the hearing had established that unrestricted placer mining operations on the power site land within the claims "could substantially interfere with

fn. 2 (cont.)

and survey by a prospective licensee of the Federal Power Commission, if such prospective licensee holds an uncanceled preliminary permit issued under the Federal Power Act authorizing him to conduct such examination and survey with respect to such lands and such permit has not been renewed in the case of such prospective licensee more than once." 30 U.S.C. § 621(a) (1970).

Neither of these exceptions is applicable to any of the lands involved in the case before us.

the use of the land for watershed purposes." He noted that appellant did not dispute this proposition, but insisted that the prospect of damage resulting from uncontrolled mining was not pertinent to the facts of the case, since the planned operations would be conducted on an extremely limited basis on a very small portion of the claims, and would be closely controlled to avoid and correct any erosion problems. Moreover, appellant had expressed a willingness to reseed and restore the surface of the claims once the limited mining operations had been completed.

Judge Mesch concluded that even if limited mining could be carried out in a manner which would not substantially interfere with the use of the power site land for other purposes, in light of the Department's decision in United States v. Paul F. Bennewitz, 72 I.D. 183 (1965), he was without authority under the Act to issue an order permitting mining which would impose any restriction or limitation on the scope of the operations.

In its appeal appellant contends that Judge Mesch's finding is mere conjecture, and points out that "[t]here is no evidence to support unrestricted placer mining operations by Appellant. * * *" Appellant also maintains that Judge Mesch erred in his reliance on the decision in United States v. Paul F. Bennewitz, *supra*, arguing that the Judge "is bound by the evidence in the instant case, and not by anything found or said in the Bennewitz case. * * *"

Appellant's arguments are without merit. We are impelled to the conclusion that the evidence introduced at the hearing by the Government amply demonstrates that unrestricted placer mining on the withdrawn land within the claims would most probably result in substantial interference with the use of such land for watershed purposes. The fact that appellant proposes to limit its operations, and to restore the surface of the claims after such limited operations, is immaterial.

The language of section 2 of the Act, which supplied the rationale for the decision in Bennewitz, is equally applicable to the case before us, which falls within the ambit of the same provisions. As the Department made clear in Bennewitz, the Act allows the Secretary no discretion to permit limited or restricted placer mining. The Secretary may permit either unrestricted placer mining or none at all. The only condition which he may impose upon his permission to mine is that after mining has been completed the locator must restore the surface of the claim to its condition immediately prior to the

commencement of mining operations. In determining whether to allow placer mining subject to this condition, the Secretary will consider: (1) whether the surface can practicably be restored to its original condition after the claim has been mined to its full potential; and (2) whether restoration of the surface would prevent substantial interference with other use of the land.

In the case at bar appellant has not shown that restoration of the surface of the withdrawn area of the claims after unrestricted placer mining can be accomplished by any practicable method which would prevent substantial damage to the watershed of which the land within the claims forms a part.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed. Placer mining operations are prohibited on those portions of the five claims in question which are within Power Site Classification No. 155.

Newton Frishberg, Chairman

We concur:

Douglas E. Henriques, Member

Joseph W. Goss, Member

